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No. 00-511

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IN THE
Supreme Court of the United States
OCTOBER TERM, 2000

VERIZON COMMUNICATIONS INC., *ET AL.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY TO BRIEFS IN RESPONSE

MARK L. EVANS
MICHAEL K. KELLOGG
HENK BRANDS
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Washington, D.C. 20036
(202) 326-7900

Counsel for BellSouth Corporation, SBC Communications Inc., and United States Telecom Association

CHARLES R. MORGAN
M. ROBERT SUTHERLAND
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Atlanta, GA 30309
(404) 249-4839

Counsel for BellSouth Corporation

WILLIAM P. BARR
M. EDWARD WHELAN
VERIZON SERVICES GROUP
1850 M Street, N.W.
Washington, D.C. 20036
(202) 463-5200

PATRICK F. PHILBIN
Counsel of Record
STEVEN G. BRADBURY
JENNIFER R. BROSNAHAN
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

MICHAEL E. GLOVER
VERIZON
1320 N. Courthouse Rd.
Arlington, VA 22201
(703) 974-2944

Counsel for Verizon Entities

November 28, 2000

Additional Counsel Listed on Inside Cover

8pp

JAMES D. ELLIS
ALFRED G. RICHTER, JR.
SBC COMMUNICATIONS INC.
175 E. Houston
San Antonio, Texas 78205
(210) 351-3500

ROGER K. TOPPINS
HOPE E. THURROTT
CHARLES J. SCHARNBERG
SBC COMMUNICATIONS INC.
1401 I Street, N.W.
Suite 1100
Washington, D.C. 20005
(202) 326-8891

Counsel for
SBC Communications Inc.

LAWRENCE E. SARJEANT
LINDA L. KENT
KEITH TOWNSEND
JOHN W. HUNTER
JULIE E. RONES
UNITED STATES TELECOM
ASSOCIATION
1401 H Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 326-7371

Counsel for United States
Telecom Association

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The FCC and its supporters all agree that if the Court reviews the Eighth Circuit's rulings concerning the pricing standard for unbundled network elements at all, it should review *both* the claims raised in our petition *and* the pricing claims presented by the FCC and its supporters. As the FCC acknowledges, "the issue presented in Verizon's petition is closely related to the first issue presented in our petition." FCC Br. 16. The Court should review both sets of issues relating to the proper construction of the pricing standard in section

252(d)(1) of the Telecommunications Act – and only those issues.[1]

Our basic challenges to the FCC's TELRIC pricing methodology present the same fundamental issues that this Court already determined were worthy of review in *GTE Service Corp. v. FCC*, No. 99-1244 (the "Universal Service Case"). As explained in our Petition, the same fundamental constitutional principles that underpinned the challenges brought in the Universal Service Case also supply the critical backdrop for the statutory construction arguments in this case. *See* Pet. 14-19.

While the FCC and its supporters do not oppose our Petition, they do attack the merits of our claims. We will postpone a full discussion of the merits to later briefing in the event that the Court grants certiorari. A few points, however, are worth addressing here.

First, the FCC claims that any arguments based on takings principles have no merit because we have not shown that using TELRIC for network-element prices will "jeopardize the financial integrity" of incumbents and that, overall, incumbents have "enjoyed quite healthy returns in recent years." FCC Br. 11 (internal quotation marks omitted).[2] But

[1] As we have explained in our brief in opposition to the petitions in Nos. 00-555, 00-587, and 00-590, the issues raised in those petitions concerning the wholesale pricing standard for finished services and the non-pricing issues do not merit this Court's review.

[2] The FCC suggests in a footnote that we have not challenged the Eighth Circuit's ruling upholding the FCC's decision to exclude the costs of existing subsidy systems from the prices for network elements. *See* FCC Br. 9 n.4. That is mistaken. The question presented in our petition broadly draws into issue the FCC's decision to "prescrib[e] a pricing methodology that requires prices based solely on 'forward-looking' costs" and thus encompasses the FCC's decisions to exclude each of a number of other measures of cost. Pet. i. And in the body of our Petition, we made clear that our challenge specifically includes the FCC's decision "to exclude

these arguments are wholly misplaced. As explained in our Petition, under this Court's decision in *Brooks-Scanlon Co. v. Railroad Commission*, 251 U.S. 396 (1920), a regulated entity cannot be forced to carry on a line of business at a loss on the expectation that it will make up the shortfall from competitive lines of business. *See* Pet. 17-18. The FCC's effort to dismiss any takings concerns with the glib observation that incumbents have been earning "healthy returns" thus ignores the proper application of *Brooks Scanlon* and the so-called "total effect" test of *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).

Second, the FCC asserts that *Duquesne* does not hold that where a regulator switches rate methodologies, it must ensure that the new methodology continues to provide an adequate return on past investments as measured under the old methodology. *See* FCC Br. 12. But the FCC cannot dispute that this Court did, in fact, apply that analysis to decide *Duquesne*. Instead, the FCC simply asserts, without explanation, that the Court's stated analysis was a "sufficient" but not a "necessary" ground for decision. But as we will discuss more fully in our merits brief if the Court grants certiorari, the analysis applied in *Duquesne* was not simply some *ad hoc* rationale invented to dispose of a single case. Rather it was rooted in application of the fundamental principle that the government cannot induce investment under one set of rules and then change the rules in midstream in a way that appropriates value.

Third, apparently relying on the Eighth Circuit's suggestion that the consequences of using TELRIC "cannot be known until the resulting rates have been determined and applied," Pet. App. 18a, WorldCom asserts that our challenges cannot be evaluated because we have provided "no rate or

consideration of the very real costs that existing subsidy systems impose on incumbents." *Id.* at 20.

revenue data." WorldCom Br. 2. But as explained in our petition, the Eighth Circuit's "ripeness" analysis was flawed in several respects, not least because it ignored the fact that under *Duquesne* parties plainly may bring prospective challenges based on the projected effects of a rate methodology. And in any event, since we are not bringing a claim for compensation for a completed taking, we need not calculate the exact dollar amount of the confiscation that will be imposed by relying on TELRIC in order to demonstrate that the novel methodology raises serious takings concerns and that the Act should not be construed to permit it.

Finally, WorldCom attempts to portray the dismissal of the Universal Service Case as somehow indicating that substantive challenges to TELRIC lack merit. *See* WorldCom Br. 3. That is baseless. GTE moved to dismiss that case when the FCC, in its merits brief before this Court, for the first time disclaimed authority to dictate the methodology States must use in setting their universal service support mechanisms. That disclaimer established that TELRIC would not be the sole measure used to set the full compensation incumbents would receive for providing universal service. GTE determined, therefore, that the case no longer presented an appropriate vehicle for addressing challenges to TELRIC. Here, in contrast, there is no question that TELRIC sets the sole compensation incumbents will receive for turning over pieces of their networks to competitors. As explained in our Petition, for this and other reasons, this case presents the best vehicle for considering challenges to TELRIC. *See* Pet. 22-24.[3]

[3] WorldCom's effort to claim now that this case somehow provides an "even poorer vehicle" for addressing the FCC's TELRIC methodology, WorldCom Br. 3 n.2, makes no sense. In the Universal Service Case, WorldCom claimed that the Court would not be able to address challenges to TELRIC at all because TELRIC would not be used to determine the full amount of the subsidy that carriers would receive for providing universal service. In this case, in contrast, as we have already pointed out, TELRIC is used to determine the entire compensation incumbents receive for turning over access to elements of their networks, and state commissions have already applied the methodology to set actual prices in dozens of proceedings. Pet. 18.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

MARK L. EVANS
MICHAEL K. KELLOGG
HENK BRANDS
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Washington, D.C. 20036
(202) 326-7900

Counsel for
BellSouth Corporation,
SBC Communications Inc.,
and United States Telecom
Association

WILLIAM P. BARR
M. EDWARD WHELAN
VERIZON SERVICE
CORPORATION
1850 M Street, N.W.
Washington, D.C. 20036
(202) 463-5200

PATRICK F. PHILBIN
Counsel of Record
STEVEN G. BRADBURY
JENNIFER R. BROSNAHAN
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

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CHARLES R. MORGAN
M. ROBERT SUTHERLAND
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Atlanta, GA 30309
(404) 249-4839

Counsel for
BellSouth Corporation

JAMES D. ELLIS
ALFRED G. RICHTER, JR.
SBC COMMUNICATIONS INC.
175 E. Houston
San Antonio, Texas 78205
(210) 351-3500

ROGER K. TOPPINS
HOPE E. THURROTT
CHARLES J. SCHARNBERG
SBC COMMUNICATIONS INC.
1401 I Street, N.W.
Suite 1100
Washington, D.C. 20005
(202) 326-8891

Counsel for
SBC Communications Inc.

MICHAEL E. GLOVER
VERIZON
1320 N. Courthouse Rd.
Arlington, VA 22201
(703) 974-2944

Counsel for Verizon Entities

LAWRENCE E. SARJEANT
LINDA L. KENT
KEITH TOWNSEND
JOHN W. HUNTER
JULIE E. RONES
UNITED STATES TELECOM
ASSOCIATION
1401 H Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 326-7371

Counsel for United States
Telecom Association

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